Texas Pipeline Association

Thure Cannon
President

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Apple Chapman (chapman.apple@epa.gov)
Tim Sullivan (sullivan.tim@epa.gov)
Christopher Williams (williams.christopher@epa.gov).
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: New Owner Clean Air Act Audit Program for the Oil and Natural Gas Sector

Dear Sirs and Madam:

The Texas Pipeline Association ("TPA") appreciates this opportunity to submit comments to the U.S. Environmental Protection Agency ("EPA") regarding the development of a New Owner Clean Air Act Audit Program for the oil and natural gas sector. TPA is an organization composed of over 40 member companies who gather, process, treat, and transport natural gas and hazardous liquids materials through intrastate pipelines in Texas. We are submitting these comments because we anticipate that the proposed new owner audit program for the production segment will serve as a template for use in other industry segments, including the midstream and transmission segments.

TPA fully supports EPA's current effort to develop a new owner audit program tailored to the oil and natural gas industry. In our experience working with state and federal programs of this kind, we have found that such programs are beneficial and fair to all stakeholders. They help to ensure that violations attributable to the seller do not unfairly burden the buyer; utilizing a new owner audit program, the buyer can identify and rectify legacy violations and thereby wipe the slate clean as the buyer takes over the newly acquired operations. Such programs also promote economic activity and investment, because companies are more likely to engage in asset transfers if the buyer is assured that it can take advantage of a new owner audit program to address violations not of its own making. These programs also provide assurance to the public that legacy issues are being addressed during ownership transfers and not allowed to continue hidden and unaddressed.

I. TPA supports the development of a new owner audit program for production sources, and we urge EPA to make such a program available to midstream and transmission sources as well.

EPA has indicated that the new owner audit program for the oil and natural gas industry will initially be made available only to upstream exploration and production sites. However, the same benefits that can be realized by implementing the program in the production segment can also be realized in other industry segments. Therefore, TPA encourages EPA to extend the new

604 West 14th Street, Austin, Texas 78701
phone: (512) 478-2871 fax: (512) 473-8476 Email: thure.cannon@texaspipelines.com

owner audit program to other industry segments, specifically including the midstream and transmission segments of the oil and natural gas industry.

Midstream and transmission transactions often involve the transfer of one or more sites and associated pipeline infrastructure, all of which is subject to environmental regulation and thus carries the potential for prior or ongoing noncompliance. The due diligence process is not materially different in the midstream and transmission segments vs. the production segment, and the post-acquisition review and audit process is also similar if not identical. This being so, we believe that the benefits of such an audit program should not be confined to production and should also be available to midstream and transmission sources. The case for adding the midstream and transmission segments to the program is even stronger when one considers that purchases and sales of assets in the production segment are often accompanied by related transfers of assets in the midstream segment, *e.g.*, processing sites or gathering and boosting facilities, and occasionally in the transmission segment. In such a situation, there would seem to be no reason why EPA's new program should cover one group of assets but not the other.

TPA believes that the currently proposed agreement template for production sources would also work for midstream and transmission sources. EPA might need to make certain revisions to the template agreement to make it better applicable to the midstream and transmission segments, but such tweaks should be minor. Alternatively, EPA could prepare a completely new template agreement for midstream and transmission sources. We would prefer the former course of action, and we would be happy to provide further input on ways to adjust the current draft template to fit the midstream and transmission segments.

II. EPA should expand the new owner audit program to cover additional environmental media.

EPA should extend the new owner oil and gas program beyond compliance issues under the Clean Air Act, to cover all environmental media under all regulations and statutes administered by the agency. The due diligence process and the post-acquisition review and audit process are obviously not limited to air issues. Rather, they involve a consideration of compliance issues related to all environmental media, *e.g.*, solid waste, hazardous waste, water, and others. Accordingly, the benefits of the new program should extend to all environmental programs. The New Owner Clean Air Act Audit Program for the oil and natural gas sector "will provide environmentally protective efficiencies and certainty" and will be "an opportunity for timely and cost-effective" compliance.[1] It is because the program carries such potentially significant benefits that we urge EPA to broaden its application.

III. The program should cover issues discovered in pre-acquisition due diligence.

EPA's new owner oil and gas audit program should cover compliance issues discovered prior to the closing of the transaction, *i.e.*, during the pre-acquisition due diligence period. During the due diligence process, the potential buyer has an opportunity to identify compliance issues.

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[1] *See* https://www.epa.gov/enforcement/new-owner-clean-air-act-audit-program-oil-and-natural-gas-exploration-and-production.

Applying the audit program to violations discovered prior to closing would achieve the same policy goals and benefits otherwise being realized through the program: enabling the new owner to wipe the slate clean and not be burdened by violations not of its own making. It was EPA's view that violations discovered prior to closing were entitled to the benefits of the 2008 new owner audit program. *See* 73 Fed. Reg. 44991 (Aug. 1, 2008). EPA should incorporate this same concept in the oil and gas new owner audit program.

Including pre-closing violations in the audit program has worked well in Texas. Under the Texas program, The Texas Environmental, Health, and Safety Audit Privilege Act[2] provides *inter alia* that a potential buyer may begin an audit before acquiring a facility. The potential buyer may then continue the audit after closing if the company notifies the appropriate agency within 45 days of closing that the company intends to continue the ongoing audit. Texas requires the notice to specify the facility or portion of the facility being audited, the date the audit began, and the general scope of the audit. EPA should follow the Texas model by allowing a potential new owner to conduct an audit that bridges the closing date, thus bringing violations discovered prior to closing into the program.

If EPA does include violations discovered pre-closing in the new owner audit program, it should also modify the applicable time periods accordingly. A prospective buyer that identifies a violation during due diligence will generally be unable to report or repair the problem until after closing, due to confidentiality provisions and lack of authority. Any delay during the pre-closing period should not count against the buyer and should not disqualify the buyer from participation in the program once the transaction has been closed. Therefore, any applicable time periods should only start to run upon closing. For example, Paragraph 10 of the draft template agreement requires the company to correct certain violations within 60 days of discovery. This provision is unworkable for a violation discovered during the due diligence process. For violations discovered pre-closing, the 60-day period for correction of violations should not begin to run until the date of closing.

IV. Companies should have nine months to enter into an audit agreement under the new oil and gas program.

The draft agreement template for the New Owner Clean Air Act Audit Program for the oil and natural gas sector provides that a company wishing to participate in the program would generally have to notify EPA within six months of the closing date of the acquisition. *See* Paragraph 4(C). TPA believes that that this is an insufficient amount of time. EPA's 2008 new owner audit program sets a nine-month deadline,[3] and we believe that EPA should provide at least the same amount of time in the oil and gas agreement template.

The reason why additional time is needed was explained by EPA itself in the 2008 new owner audit program preamble. EPA considered stakeholders' comments that a six-month deadline should be set, but EPA ultimately decided that a longer period, nine months, was more appropriate. EPA noted that "post-transaction demands may make it difficult to focus corporate

[2] Tex. Civ. Stat. art. 4447cc.

[3] *See* 73 Fed. Reg. 44997 (Aug. 1, 2008).

attention on an immediate evaluation of environmental compliance issues, especially when the company would have to make a potentially expensive commitment to conduct audits and address noncompliance."[4] EPA correctly acknowledged that "requiring such potentially high-stakes decision-making too quickly after the transaction, before the new owner has had the chance to operate its facility, would mean that fewer new owners would come forward, notwithstanding that, given more time for consideration and analysis of the situation, some would have indeed used the Audit Policy."[5] Based on these considerations, EPA concluded that six months was too short because it would result in fewer companies participating in the program: "Since EPA's intent is to encourage new owners to audit and disclose, and work with the Agency to correct problems, it seems advisable to provide sufficient time for decision-making."[6]

These considerations are fully applicable in the oil and natural gas industry. Transactions in the industry can be complex. The post-acquisition period is often very busy, with great focus placed on integrating the newly acquired assets into the buyer's ongoing operations. In this context, it would be difficult for the new buyer to quickly assess whether, and to what extent, it should participate in the voluntary audit disclosure program. We have not seen any indication that the nine-month period used in the 2008 program is not working in some way. Accordingly, TPA urges EPA to set, at a minimum, a nine-month deadline for participating in the new oil and gas program.

V. Program participants should not have to use EPA's template agreement in all cases.

One key to a successful self-audit program is flexibility. The tools used by EPA and a program participant should match the particular circumstances at issue. One of those tools is the agreement between EPA and the self-auditing company setting out the terms of the company's participation in the program. We see no need for EPA to rigidly insist that the same template agreement be used in every case. Rather, if the circumstances warrant, EPA should be willing to stray from the terms of the template.

In describing the New Owner Clean Air Act Audit Program for the oil and natural gas sector, EPA stated that "offering additional flexibilities under a specific and tailored new owner audit program will make it easier for the regulated community to self-disclose and correct violations, thereby providing additional protection for public health and the environment."[7] We agree with EPA's recognition of the importance of flexibility in this context. One way to increase flexibility is for EPA to allow companies to tailor the agreement to the particular facts at hand, where the circumstances warrant. We ask EPA not to rule out the possibility of such a tailored agreement for the new oil and gas audit program.

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* https://www.epa.gov/enforcement/new-owner-clean-air-act-audit-program-oil-and-natural-gas-exploration-and-production.

VI. EPA should add clarity to the reference in Appendix C to audit instruments, audit protocols, and audit checklists.

The draft template agreement, at Appendix C, contains a paragraph pertaining to audit instruments. It appears that the term "audit instruments" includes audit protocols and audit checklists. It also appears that the audit protocols consist of the requirements outlined in Appendix B, but this is somewhat unclear because the requirements in Appendix B are not referred to as protocols. We would appreciate more clarity on whether the requirements in Appendix B do in fact constitute the "audit protocols." In addition, we would appreciate guidance on what the audit checklist should entail.

VII. EPA should look to the Texas program as a model.

TPA members have significant experience with the Texas self-audit policy, implemented by the Texas Commission on Environmental Quality under the Texas Environmental, Health, and Safety Audit Privilege Act.[8] Our members have generally had good experiences with the Texas policy and we have found it to be beneficial during acquisitions.

We encourage EPA to review the Texas program and consider incorporating aspects of the Texas policy in EPA's new oil and gas program. TPA has already suggested that EPA follow the Texas example of including in the audit program those violations that are discovered prior to closing. We also ask EPA to consider adding a key feature of the Texas program, application of an evidentiary privilege for audit reports. The privilege, which is set forth in Section 5 of the Texas Environmental, Health, and Safety Audit Privilege Act, generally provides that audit reports are privileged, inadmissible as evidence, and not subject to discovery in civil and administrative proceedings. The existence of this privilege gives additional comfort to reporting companies and is likely to have resulted in additional companies choosing to disclose violations under the Texas program, to the benefit of those companies, the public, and the environment. It would be beneficial if EPA adopted a similar approach.

VIII. EPA should clarify the interplay between federal and state audit program participation.

Paragraph 3 of the draft template agreement provides that a company may choose to enter into a parallel audit agreement with a state that has a state audit policy. Paragraph 29 provides that EPA will notify states of violations disclosed and corrected under the federal agreement. There does not appear to be a need for EPA to notify a state in this manner if the company has entered into a parallel agreement with the state. If a company is performing both a federal and a state audit, the company will be responsible to making appropriate disclosures to the state agency. Injecting EPA into the dialogue between the company and the state seems both unnecessary and potentially confusing. We suggest adding a provision in Paragraph 29 stating that EPA need not notify a state of violations disclosed and corrected, if the company has entered into a state audit agreement covering the same facility.

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[8] Tex. Civ. Stat. art. 4447cc.

In addition, EPA should align deadlines under the federal program with corresponding deadlines in analogous state programs. EPA should consider provisions that make federal deadlines for notifications, submissions, and similar reporting requirements correspond to analogous deadlines in state programs. This would help to streamline the dual use of state and federal programs.

Finally, in no event should the participation in the federal program prevent a company from also participating in a state program. The federal program should be an additional alternative and should not displace a state program under any circumstances.

IX. Conclusion.

TPA supports the concept of voluntary self-audit programs generally and EPA's current effort to tailor such a program to the oil and natural gas industry. We note that most if not all of our member companies already have rigorous compliance programs in place, requiring regular audits and prompt repair of leaks and other issues that are discovered, regardless of any federal incentives to do so. Voluntary self-audit programs, such as the oil and gas program currently under review, are appropriate and beneficial in that they encourage and reward the efforts that companies make to run safe and environmentally sound operations. Accordingly, we appreciate EPA's efforts and we encourage EPA to consider our comments as a way to make the program even more effective.

We appreciate the opportunity to submit these comments. We note that GPA Midstream Association is also filing comments supporting EPA's efforts, and TPA also endorses and supports the comments filed by GPA Midstream.

Yours truly,

Thure Cannon
President